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JUSTICE OR LITIGATION?

ONE may well inquire whether we are a justice-loving people, or merely a litigious people. We have provided ourselves with a machinery of litigation which is impressive in the number of agents employed and the volume of business which it is expected to dispatch. Our judicial procedure is excellently designed if there be any civic or social or economic virtue in litigation. It is as though we had acted upon a philosophy to be expressed as "litigation for litigation's sake."

As to the worth of the product of this great machine we exhibit constantly increasing skepticism. Especially in the realm of the small civil cause—the one known to the law as "petty" —opinion is becoming emphatic. The uncertainty of results and the disproportionate cost in this field constitute for many persons a virtual denial of justice.[1] Dr. Roscoe Pound has said that the cumbersome organization of our courts and the backwardness of our procedure "have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community."

There is a larger element of our population upon which the burden of slow and costly litigation falls more heavily, for the wage earner cannot transfer his losses to the cost of his product. He is the ultimate sufferer. And since, through collective action and better education, he is becoming every year more critical and more articulate, the conditions of his living and his state

[1] *Reginald Heber Smith.* "Justice and the Poor." Carnegie Foundation for the Advancement of Teaching, Bul. XIII, p. 6. "The Denial of Justice." Journal of the American Judicature Society, Vol. III, no. 4.

of mind become increasingly consequential from the standpoint of a government which rests upon the consent of the governed.

If a way can be found for administering justice in small causes which is ideally prompt and inexpensive we must adopt it or stand convicted as a people who are less concerned with justice than with litigiousness. There are instances of success in this field so recent that many lawyers and judges have not yet heard the news. It is timely to know what is being done so that future progress may be consciously directed in safe channels.

One cannot read the simplest statement about the working of the branch court of Conciliation in Cleveland without feeling inquisitive. For here is a court which brings the parties to small controversies together and resolves their claims in a few minutes at a trifling cost.[2] It is even claimed that the parties leave the Conciliation court "satisfied." There is surely something revolutionary, if not positively utopian, in this claim.

The establishment of the Conciliation branch is a good example of the way a unified and organized court reacts to public needs, and of the ease and simplicity which are inherent in the operation of such a court. The Municipal Court of Cleveland is in a measure a unified court, for it has a considerable range of jurisdiction, embracing a great variety of causes, both civil and criminal, and it has no competitor within its field. This makes the court definitely responsible for its share in the administration of justice. The ten judges of this court must take care of all the civil causes involving less than one thousand dollars, or stand convicted of failure, for they are given powers commensurate with the task. They are obliged to invent and apply methods which will economize their own time, and this means final determination of causes as speedily as possible.

It is an organized court in the sense that it possesses liberal powers with respect to procedure and administration and is so constituted that its force of judges can be utilized intelligently

[2] *Raymond Moley.* "The Municipal Court of Cleveland." National Municipal Review, Vol. V, no. 3. *Judge Manuel Levine.* "Conciliation Court of Cleveland." Journal of the American Judicature Society, Vol. II, no. 1.

to yield a maximum product. Its small claims branch was established by an order directing the clerk to segregate claims under thirty-five dollars on a special calendar to be heard once a week; the clerk was also directed to assist plaintiffs in stating roughly the nature of their claims. As assistant this officer weeds out the non-justiciable complaints at the beginning.

Upon the filing of a claim the clerk mails a summons to the defendant. In a few days the parties are in court in person and without counsel. There are no spectators. The judge hears the statements of both parties and asks questions. He is soon able to determine their rights and a judgment is entered. If a party were to insist upon a jury trial he would be accommodated, but there are no jury demands. Feelings of hostility seem to vanish in the peaceful atmosphere of the Conciliation court. A jury trial can be had so speedily that no opportunity is given a debtor to stall by going to this additional expense and effort. If the debtor admits liability but needs time to pay, which often furnishes the motive for litigating, he is permitted to pay the judgment in installments. And there are no appeals. The costs are insignificant, usually forty-five cents when a judgment is given. A single judge has been able to dispose of more than five thousand cases a year when sitting but half a day of each week in the Conciliation court.

The judges of the Cleveland court made a very thorough study of the entire subject before embarking upon this experiment. They were doubtless much influenced by the success of conciliation procedure in Denmark and Norway, where it has a history beginning in 1795, when these kingdoms were united. At that time justice was suffering from the inherited shackles imposed by a parasitic officialdom. Because the courts were unable to do justice in many cases the reform, which came about through royal edict, ignored the judges and lawyers and set up a system of lay officials as conciliators.[3]

In principle the procedure has not been altered in either of these countries in over a century. Except in certain enumerated

[3] *Nicolay Grevstad.* "Courts of Conciliation." Atlantic Monthly, Vol. LXVIII. Idem Vol. LXXII, p. 671. Journal of the American Judicature Society, Vol. III, no. 4.

classes, the courts are not permitted to entertain a complaint until there has been an attempt at conciliation. This prevents an unjust or litigious person from employing judicial process in an oppressive manner. Every person is given an opportunity to escape litigation by doing justice. There can be no threats to "have the law on him." During the stage of negotiation both parties are free from prejudice.

The opponent cannot balk the proceeding by ignoring the summons issued by the conciliation board, for in case of default in appearance he will be required to pay the plaintiff's costs subsequently, even though he prevail in the action. This indirect mode of compulsion appears to be entirely successful in bringing about the desired meeting of the parties on neutral ground.

The machinery of conciliation is simple. In Norway two commissioners are elected to serve for three years in every city, every village of twenty families and every parish. The commissioners sit together at stated times every two weeks, one presiding and the other acting as minute clerk. They receive no pay except the trifling fees—twenty-five cents for a summons and fifty cents if conciliation is effected. It is possible therefore to have a sufficient number of boards to accommodate the people of every little hamlet, so that personal appearance is no burden to the parties.

The complainant submits a statement of his claim in a letter, informally. The sessions are private. Lawyers, unless themselves parties, are not admitted, though for good cause a party may be represented by an agent. Admissions made by a party cannot be used against him in any subsequent proceeding. The commissioners are pledged to secrecy.

The conciliators may also act as arbitrators, rendering a judgment when the parties agree to submit their case to adjudication. In most cases the judgment is one of conciliation, its sanction resting upon the agreement of the parties.

The Danish Judicial Code of 1916 preserves this procedure in substantially the same form as Norway's.[4] The excepted

[4] *Axel Teisen.* 65 PENN. LAW REV. 543. Quoted in Journal of the American Judicature Society, Vol. II, no. 1.

cases are: counter-claims, suits brought on negotiable instruments, cases by or against the state or its officials, cases of great necessity (to be decided by the court), where publication of the summons has to be resorted to, where the defendant is out of the country and has no known representative in the country, and in certain cases of attachment. Denmark has special commissions for disputes between masters and servants, and for cases coming under the jurisdiction of the Admiralty and Commerce court a special commission of experts. In certain cases the court itself acts as conciliation commissioner, before it hears the case judicially, but this kind of conciliation is said to be a mere matter of form. It appears that after process has issued it is too late to conciliate.

To an American some weak elements will appear *a priori* in this scheme. Our experience makes us skeptical at three points: the commissioners are elected, they are poorly remunerated, and they are not lawyers. But, however the general scheme of elections may work out in Norway and Denmark, it is undoubtedly a fact that the people succeed in electing as conciliators men who are well qualified to make the procedure successful. Men of the right sort doubtless derive enough honor and prestige from the position, and from the sense of an important public duty faithfully discharged, to offset the small pay. As to the point that they are not learned in the law a great deal could be said. They doubtless become proficient in the simpler points of law most frequently occurring. If they err there is no prejudice to either party if he merely stands on his rights and demands a regular trial. If they err, and their error is accepted, there is at least a speedy determination of the controversy, and one acceptable to the parties, which implies a much higher percentage of success than can be claimed for our inferior tribunals, especially when they employ a jury, thus multiplying the ignorance of the magistrate.

But after all the test must be the test of performance. Statistics show that in Norway about eighty per cent of all such proceedings result in conciliation judgments, and about ten per cent more reach final judgment under the powers of the commissioners to arbitrate by agreement of the parties. This tells

the story. In all cases susceptible to conciliation nine-tenths go no further. And yet there is no prejudice to more costly and meticulous justice. The cases constituting the tenth which must be tried by the ponderous and expensive machinery of the courts are not prejudged or loaded with additional costs or appreciable delay.

The Cleveland experiment soon provided working data for our theories concerning cheap and speedy justice. It was of course inevitable that there should be attempts in other cities to get similar results. In the Municipal Court of Chicago a branch was established, with jurisdiction to thirty-five dollars, under the name of the Small Claims branch court.[5] No procedure was specified. It was an experiment to ascertain whether the public and the bar would accept speedy and informal trials. A good deal of credit is due the judge first assigned to this branch, because he had to break down old habits. He had to discourage continuances, jury demands and reliance upon the niceties of the law of evidence, so admirably adapted to make an artificial complex out of an ordinary situation. It was not as simple for him as for the Cleveland Conciliation judge, because in Chicago the hearing was public and the discouragement of appearance by counsel was not easy. At a very early stage the Chicago Bar Association rendered good service by a formal resolution asking the bar to assist in making the new branch a success.

It took only a short time to prove the Small Claims court a complete success. The judge was able to dispose of contested cases in an average time of fifteen minutes each, and the solvent condition of the calendar caused the settlement of a large proportion of cases before return day. The number of default cases, implying the absence of a legal defense, also served to reduce expense to the court and the plaintiffs. When the plan of informal trials was proved successful the jurisdiction of the branch was successively raised three times, until it stood at two hundred dollars and received all the time of three judges. The saving to the court is very great as the jury branches are relieved of most of the causes involving less than two hundred

[5] American Judicature Society, Bul. VIII; Journal, Vol. II, no. 1.

dollars. This is not conciliation at all, but a regular adjudication at the hands of a trained judge, who finds the facts from the sworn testimony of witnesses, listens often to a brief argument, and then applies the law. It deserves mention here as illustrative of the way a general idea works out in various forms.

The Minnesota legislature was induced in 1917 to provide a conciliation judge and branch for the Municipal Court of Minneapolis.[6] In cases involving fifty dollars or less he was empowered to render judgment on the facts adduced under oath, but in larger causes, up to one thousand dollars, he could only act as conciliator. The plaintiff is not required to take a claim over fifty dollars to the Conciliation court. The result is that comparatively few such cases are brought in this court, though most of these result in an agreement of the parties which receives the sanction of a judgment.

The Minneapolis Conciliation court is considered a success. In a report in 1918 to the Minnesota State Bar Association, which had actively promoted the Conciliation court law, its committee told of the success of the innovation and recommended an extension of the practice to all of the municipal courts of the State. The committee also said: "As to the law itself, an attempt at conciliation before a regular suit should be compulsory in all classes of cases, where possible, when the amount involved does not exceed one hundred dollars." [7]

The class of cases to which conciliation is found to be applicable is wider in Minneapolis than in the Scandinavian countries, for replevin cases are handled successfully. The court has found it safe to take into custody personal property on a sworn complaint and without a bond.

The Municipal Court of New York was the next to enter this field.[8] Conciliation rules and arbitration rules were adopted and promulgated at the same time. When a plaintiff elects to proceed under the conciliation rules a notice is mailed to the defendant, requesting (not commanding) him to appear "for the

[6] Laws of Minnesota, 1917, c. 263. 1 MINN. LAW REV. 107. *William R. Vance*, Journal of the American Judicature Society, Vol. II, no. 1.

[7] Proc. Minn. State Bar Ass'n, 1918, p. 183.

[8] Journal of the American Judicature Society, Vol. I, no. 5; Vol. II, no. 1.

purpose of an amicable adjustment of the controversy." The defendant is at liberty to ignore this notice. The arbitration procedure may be invoked only when both parties choose to avoid formal procedure.

In New York, conciliation, being on a voluntary basis, did not start with a full calendar as was the case in the other cities. It had to depend upon the growth of a habit, which makes its success necessarily slow, as is the case with commercial arbitration. It is still too soon to form an opinion as to its ultimate success in New York. Possibly much will depend upon the willingness of the court to advertise its facilities and to interest prospective suitors. It would seem reasonable also to impose some slight penalty upon the defendant who refuses to respond to the request for conciliation, as is done in Norway and Denmark.

We have also in this country an abortive attempt to transplant the Scandinavian conciliation procedure. Norwegian immigrants in North Dakota long ago saw the absurdities and wastefulness of litigation under our system and asked for their accustomed conciliation procedure. What they got was a cunning parody on their system which enabled justices of the peace to strangle a dangerous competitor. The act (1895) provides for the election of two conciliators in every township, incorporated village and city. These conciliators cannot act until called into court by the justice, and cannot be called in except the parties unite in requesting it, or at any time except between the issuance of summons and the return day.

Of course the statute failed, as it was intended to do. Or it may be said that it succeeded for many years in its obvious purpose of quieting further demands for conciliation procedure.

The New York State Bar Association has endorsed the principle, having twice had a bill introduced in the legislature for the appointment of a commissioner of conciliation by the Appellate Division of the Supreme court in the first Division (New York City). The duty of the commissioner would be to endeavor to bring about conciliation of suits already docketed, under rules to be prescribed by the court.[9]

[9] Journal of the American Judicature Society, Vol. I, no 2, p. 27.

Both Kansas and Oregon have provided special informal tribunals, limited in jurisdiction to twenty dollars, for the relief of poor persons having small claims.[10] These attempts are of interest chiefly because they show that the need for cheapening justice to small claimants is not limited to populous centers. The greater progress has been made in the cities because they have possessed courts capable of nurturing such a delicate plant as conciliation appears to be in a land habituated to harsh and rigorous litigation.

Here are some deductions from the foregoing facts:

Litigation of private claims is not of itself a meritorious act of citizenship any more than it is a profitable undertaking. If in certain cases justice is attainable only through long and costly procedure—trials, appeals, retrials and so forth—there can be no harm at any rate in permitting first a private meeting of the disputants under auspices favorable to a just settlement. It is only after attempts at conciliation have failed that litigation can possess any positive virtue in private affairs. And in case conciliation fails there is no prejudice to a fair trial subsequently

To this end the disclosures before the conciliation agent must be barred from subsequent trials. Such a rule permits the disputants to disclose freely and this is a prime factor in getting results, for many lawsuits are due to partial information as to the facts on the part of one or both of the parties.

To make an unqualified success of conciliation it should be made a compulsory step in advance of the issuance of process by the courts, except in classes of cases to which it could not apply, as, for instance, injunction suits. While impractical in some suits for divorce, it would prove extremely valuable in others. Our present method is most effectual in exaggerating the differences which have led to temporary estrangement between husband and wife.

Conciliation procedure is not in its nature peculiarly urban. There is everywhere a crying need for direct and simple justice and especially in the affairs of those who can least afford the

[10] *Reginald Heber Smith.* "Justice and the Poor." Carnegie Foundation for the Advancement of Teaching, Bul. XIII, pp. 43-46. American Judicature Society, Bul. VIII.

luxury of litigation. There is no reason for thinking that the cities provide a method for litigating small civil claims inferior to that provided in the towns and rural districts.

Conciliation procedure must be looked upon, not as something hostile to the work of the courts, and competitive to them, but as a practical means for administering justice in a large proportion of cases, especially those involving small amounts. It should be instituted, not independently of the judicial system, but added as an extension to and an improvement upon existing procedural methods. The conciliators should be themselves judges or persons under the immediate supervision of the courts.

The ideal way then is to provide a system flexible enough to fit the conditions in all parts of a State.[11] We cannot look with favor on the idea of electing conciliators. We elect far too many local officials at the present time in all States. We cannot secure by election the type of men needed for this important work, many of whom would either refuse to become candidates, or would be unable to compete with local politicians.

In States which have a county court system, and county judges trained in the law, a considerable part of conciliation could be taken care of by such judges. But in most States this would still leave room for lay conciliators in villages at some distance from the county seat.

We can probably simplify the business by submitting cases to a single conciliator, instead of two; especially if we permit the parties to transfer their matter to another conciliator, or to the county judge. Such right of transfer would serve a useful purpose, for, no matter how unbiased and capable the conciliator, some persons would still have a prejudice against him. The complainant has the first choice, but if the defendant has a prejudice against the conciliator selected by the complainant, it should be easy for them to agree upon another at no great distance, and transfer the cause. Confidence in the wisdom and impartiality of the conciliation agent is greatly to be desired.

To prevent the work from being onerous to the lay conciliator, we should provide that he may sit out of regular business

[11] Journal of the American Judicature Society, Vol. II, no. 5. (A draft act embodying these views.)

hours (which would benefit all concerned), and that he may refuse to serve in any given instance. But the county judge would not have this right and so would be available at all times.

The selection of conciliators should be by the circuit judge. He could readily ascertain the qualifications of persons willing to serve, and would be close enough to them after appointment to superintend their work and afford counsel. By making the conciliators assistants to the circuit court the position would be one of high honor.

As the work of the conciliators would not be evenly distributed it would be difficult to adapt any salary provision to this office. At the same time the parties should not be expected to pay enough to carry the expense of the business. The costs paid by litigants under our system probably never defray the public expense. There remain two alternatives as to compensation: to have the county pay an adequate fee, or to require the conciliators to serve without pay. The county could well afford to pay adequately, as it would save a dollar for every dime so expended, but there is good reason also for supposing that the system would work well without any remuneration; it would be a high honor to render service of this sort, and the kind of men who would best fill the position are those who would scorn petty earnings. On our library boards, police commissions and similar local and State boards, we have many instances of loyal service without pay.

What is at the bottom of ordinary petty litigation? What causes it? Sometimes it is spite. When there are hard feelings, what could be so wholesome as to have the parties closeted for a short time with a disinterested, reasonable man of their own community? The mere prospect of such an interview would go far to calm turbulent minds just as the prospect of speedy determination would prevent resort to the courts from a spirit of mischief or revenge.

But probably most instances of petty litigation arise from a misunderstanding of the facts. Our contentious system of administering justice is admirably designed to foster misunderstandings. A lawsuit is a battle, no more and no less. People learn to save their trump cards for the critical moment. Con-

ciliation interposes one moment of sanity. While we have far too many cases in court, because process lends itself to private ends, there are at the same time many controversies which deserve adjudication of some sort, but are suppressed. These suppressed disputes, like those which hang fire in the courts, and those which are litigated to a useless conclusion, or perish from procedural blundering, are all festering sores. They are productive of discontent which finds expression in diverse and unforeseen ways.

Our contentious system is admirably designed to discover hidden facts and to compel a searching of the laws and the decisions. It serves the end of building up from small aggregates the great wall of the common law. But its universal employment *ab initio* for the adjustment of all the little neighborhood disputes and mistakes is the perversion of a great system; it is litigation gone mad.

The official who is a parasite on litigation will frankly find in conciliation his deadly enemy. The legal profession cannot afford to align itself against a great and growing principle. The lawyer who finds self-interest opposed to the conciliation of small claims is in a pitiable condition, for to the profession in general petty litigation is never profitable. Indeed it constitutes an obligation in the minds of many lawyers, one difficult for them to discharge, for since the lawyer is the key that unlocks the doorway to justice it is his duty to see that justice is denied no man too poor to pay his lawyer.

The legal profession can no more afford to oppose a fair trial of conciliation than the medical profession can afford to scatter germs of disease. Lawyers everywhere consider themselves conservators of good institutions. So far as they view adjudication as necessarily contentious they may be tolerant of our system. But they will do well to get the perspective of the client, so well expressed by Mr. Elihu Root in these words:[12]

> "There is great economic waste in the administration of the law viewed from the standpoint of the nation and of the states. There is unnecessary expenditure of wealth and of effective working power in the performance of this par-

[12] President's Address, American Bar Ass'n, Proc. 1916.

> ticular function of organized society. We spend vast sums in building and maintaining court houses and public offices and in paying judges, clerks, criers, marshals, sheriffs, messengers, jurors, and all the great army of men whose service is necessary for the machinery of justice, and the product is disproportionate to the plant and the working force. There is no country in the world in which the doing of justice is burdened by such heavy overhead charges or in which so great a force is maintained for a given amount of litigation. The delays of litigation, the badly adjusted machinery, and the technicalities of procedure cause enormous waste of time on the part of witnesses and jury panels and parties."

It is indeed a pity that our judicial institutions cannot be defended without such a broad confession. Who can blame ignorant discontent if it fails to make the proper distinctions between what is worthy in principle and contemptible in practice? Chief Justice Winslow of the Wisconsin Supreme Court has declared: [13]

> "Equal and exact justice has been the passionate demand of the human soul since man has wronged his fellow man; it has been the dream of the philosopher, the aim of the lawgiver, the endeavor of the judge, the ultimate test of every government and every civilization."

We are no exception to inexorable law. Our civilization will acquire the means for satisfying the universal call for justice or it will forfeit its right to survive. When lawyers struggle to conserve a system of administering justice which they know to be fundamentally right they must see to it that their system is capable of proving its worth beyond all cavil in the minds of sensible and reasonable men.

Herbert Harley.

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[13] President's Address, Wis. State Bar Ass'n, Proc. 1919.